70-3231

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

~~NO. 1848~~ 70-303

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency
of the State of Florida, et al,

Respondents.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The petitioner files this, its Reply Brief addressed to arguments first raised in respondent's brief in opposition, as permitted by Rule 24(4).

RESPONDENT'S OBJECTION TO JURISDICTION

Respondent contends (I) that the decision of the Florida Supreme Court is entirely consistent with applicable state law, (II) that no substantial federal question has been raised, and (III) that the federal question was not timely raised.

RESPONDENT'S STATEMENT OF THE CASE

Respondent concedes that petitioner's statement of the case is "substantially accurate", but respondents restate the same in a manner calculated to minimize or obviate the federal question.

Respondent does not deny that the tax was assessed without a hearing, based upon a conclusive presumption which the taxpayer was not allowed to repel.

It is not disputed that the Supreme Court of Florida, in discharging the alternative writ, has held, in effect, that the amount

of the "subject to" mortgage will be conclusively presumed to be consideration for the conveyance. Respondent refers to the stipulation of the parties which was before the Florida Supreme Court. Since that stipulation has not yet been made a part of the Appendix by either party, petitioner adds it to this brief as petitioner's Appendix "I", in order that it will be before the Court for such consideration as the Court finds proper.

Please note that it is in two parts, the second part being styled "Supplementary Stipulation". The exhibits to the stipulation are not being attached for the reasons that they are correctly summarized in the stipulation itself and their inclusion herein would make this brief unnecessarily long since they include voluminous matter not germane to this inquiry.

ARGUMENT

I

Respondents contend that the decision sub judice is "entirely consistent with applicable state law".

Petitioners insist that before the decision complained of, it was the law of the state that taxable considerations would not be determined by speculation.

The stipulation clearly reflects (Page 1 of Supplementary Stipulation) that the buyers specifically contracted against liability under the existing mortgage, and petitioner alone was liable in case of deficiency after foreclosure. That the buyers in fact paid installments on the mortgage after the sale the sale does not alter the fact that they were not legally bound to do so, and they obviously did so only to protect their "equity." Should they refuse to make the payments when due, for whatever reason, the petitioner alone would be responsible. It is therefore speculative, to say the least, to treat the full amount of the mortgage as taxable "consideration" just as if the buyers had assumed or paid it so as to relieve the petitioner entirely of his liability.

This is the point which respondent ignores in its brief, just as it was ignored by the Supreme Court of Florida. Yet, before this case, it was the settled law in that state, as it had held in De Vore v. Lee (Fla. 1947) 30 So.2d 924 at 927:

> "When taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to considerations which have a reasonably determinable pecuniary value. The sole considerations passing to the lessors for the

leases were executory promises for executory considerations. Such leases were not taxable under Sec. 201.02, F.S.A. and F.S. 1941.

We respectfully urge that the decision sub judice was not "entirely consistent with applicable state law" as respondents contend.

II

Respondents insist that there is no substantial federal question raised.

In answer to this contention, petitioner points out that a tax has been assessed against petitioner arbitrarily based on speculation, and petitioner has not been afforded a hearing on the amount of the tax prior to its assessment, imposition and collection (Page 4, Appendix to Petition).

Further, the question of taxable consideration was conclusively presumed against petitioner, with no opportunity to repel the presumption.

Respondents do not directly dispute these contentions of petitioner but seek to excuse them on the contention that the statute authorizing the tax differs from the Federal Statute (26 USC, Section 4361) from which respondents suggest was patterned in that the federal act expressly excluded the value of mortgages when it placed the tax on the consideration for the conveyance.

Respondents do not contend, however, and cannot contend that the Legislature by its enactment of Section 201.02, Florida Statutes, intended to include as taxable consideration the amount of a mortgage which was not assumed.

The arbitrary and speculative treatment of an unassumed mortgage in the full amount thereof as taxable consideration is clearly a denial of that due process guaranteed by the Federal Constitution. The decision of the Supreme Court of Florida has therefore passed upon a federal question of substance.

Application of this particular tax in such a manner does not appear to have been reviewed by the Supreme Court of the United States prior to this time, although the constitutional position taken by petitioner appears to have been uniformly protected in the prior decisions of this Court.

Certainly, the decision of the Supreme Court of Florida has been made "in a way probably not in accord with applicable decisions of this Court, within the purview of U.S. Supreme Court Rule 19(1) (a), 28 USCA.

III

Respondents contend that the federal question was not raised until petition for rehearing.

Actually, the question of due process raised herein was part and parcel of the controversy from its inception. Under Florida law, its Supreme Court had original jurisdiction, and the question presented to it was simply stated, whether the state taxing authority could treat as taxable consideration an unassumed mortgage.

The Supreme Court in effect has ruled that such a mortgage is conclusively presumed consideration. Such a ruling violates the due process clause, and since it also is a departure from existing state law it denies equal protection. The first opportunity of petitioner to raise the question of the denial of federal constitutional rights by the state court ruling was on the petition for rehearing, and the Florida Supreme Court was clearly asked to reconsider its ruling on constitutional grounds, which it declined to do. Therefore, the federal question was clearly presented and ruled upon in the court of first and last resort.

Since the Supreme Court of Florida had original jurisdiction, petitioner presumed it would follow existing state law and correctly apply the decision of the United States Supreme Court with regard to due process and equal protection. When it did not do so, and instead conclusively presumed the question of consideration, contrary to the stipulated evidence, then the only opportunity afforded

petitioner to seek redress on the federal questions thus raised was by means of petition for rehearing. Under these circumstances, we submit, it is a farce to contend that petitioner did not seasonably raise the federal question.

The cases cited by respondents' brief all involve instances where the federal question was not raised in the Court having original jurisdiction and are, we submit, inapplicable.

CONCLUSION

The jurisdiction of this Court is properly invoked where it is shown that the Supreme Court of Florida, in a case of original jurisdiction, "has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

If the decision sub judice is allowed to stand as authority for the imposition by the state of a tax based on a presumed consideration, measured by speculation, and without opportunity to the taxpayer to repel the presumption, then we are in peril.

The pressure on local and state officials for new sources of revenue will virtually insure taxation on the transfers

of other types of property, based on its speculative value.

The question here involved, therefore, is indeed one of great substance, far transcending the monetary amount of the tax presently involved.

The mortgage in question was taxed as part of the consideration for the original purchase of the property by the petitioner. The question of whether such an outstanding encumbrance can be taxed as consideration for a subsequent conveyance by the petitioner when his buyer expressly contracts against assuming the encumbrance, is a novel one before this Court. Moreover, the Florida court decided the question by conclusively presuming such encumbrance as part of the consideration and this decision is contrary to the due process and equal protection provisions of the Federal Constitution and applicable decisions of this Court with regard to those guaranties.

We respectfully submit that this case meets the criteria of U.S. Supreme Court Rule 19, and the Writ of Certiorari should

be granted as prayed.

Respectfully submitted,

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PROOF OF SERVICE

THIS IS TO CERTIFY that I, Ralph H. Bearden, Jr., one of the attorneys for the petitioner herein and a member of the Bar of the Supreme Court of the United States, on the 28th day of September, 1971, served true and correct copies of the foregoing Reply Brief of Petitioner on the respondents by depositing the same in the United States mail in an envelope duly addressed to Robert L. Shevin, Attorney General, State of Florida, with first-class postage affixed.

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.

By RALPH H. BEARDEN, JR.

STIPULATION

(Style of Case Omitted)

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties herein as follows:

KENDALL HOUSE APARTMENTS, INC., (hereinafter referred to as the seller) is engaged in the business of selling and leasing real estate in the State of Florida.

On may 29, 1968, the seller transferred by two warranty deeds certain real property located in Dade County, Florida, to Clinton H. Churchill and Clinton D. Churchill of 1420 Main Street, Buffalo, New York. The said Warranty Deeds were recorded in Official Record Book 5967, pages 547/9, and the property involved in each instrument was subject to a prior and separate mortgage. Although the transactions involving the two deeds were somewhat intertwined and handled simultaneously, only the deed of one of these transactions concerns the parties to the stipulation at this time (see attached copy of that instrument labeled Exhibit "A").

The property to which the deed in question pertained and which was described therein was, at the time of sale and recording of the deed, subject to a mortgage in the amount of $493,705.68 payable to Life Insurance Company of Virginia. According to the "Closing Statement" (copy attached as Exhibit "B"), the sole and total consideration from the buyer for the property covered in both instruments was a payment of $650,000. This does not, however, take into consideration the fact that both pieces of property were still subject to the encumbrances of a mortgage.

The seller has agreed from the origin of the transaction that it would pay any and all recording fees and stamp taxes. Therefore, the present discussion involving a dispute as to payment of documentary stamp taxes concerns only the seller (who has assumed any tax liability that exists) and the question of its liability to the state agency known as the Department of Revenue (hereinafter referred to as the State).

It is admitted by both of the undersigned parties that the taxes on both deeds have been paid to the extent of the $650,000 consideration. The State claimed that a balance of $1,481.40 in regular documentary stamp taxes, pursuant to Section 201.02, Florida Statutes, remained owing on the deed in question after that deed was recorded. The State's claim was based on the fact that the mortgage of $493,705.68 was outstanding and was either expressly or impliedly assumed by the buyer and in and of itself constituted consideration. If said tax is proper, it is derived from the provisions of Sections 201.02, Florida Statutes. The State did not claim that any additional surtax was owed, in light of Section 201.021, Florida Statutes, which specifically exempts existing mortgages when determining consideration for surtax purposes.

In response to the assessment by the State, the seller paid the tax under protest on April 24, 1969, mailing check #2401, drawn on Pan American Bank of Miami, Miami, Florida,

and signed by Richard J. Tugg in the amount of $1,481.40; see attached letter of acknowledgment along with statement of May 5, 1969, by the State (labeled Exhibit "C"); see also attached letter of acknowledgment along with a corrected statement of July 3, 1969, by the State (labeled Exhibit "D"). It is emphasized that the tax was paid only as to the Warranty Deed in question; not as to the other one not specifically at issue here. A Requisition for Refund was submitted by the seller on or about June 30, 1969 (see attached copy labeled Exhibit "E"); said Requisition was formally denied by the State's letter of July 10, 1969, a copy of which is attached (Exhibit "F").

It is further agreed by the undersigned parties that the other deed transaction, which occurred simultaneously with the one at issue, and in regard to which no taxes have been collected, will be subject to and finally controlled by the final decision made by the Supreme Court of Florida in an original mandamus proceeding to be brought in said Court by the seller, respecting his claim for a refund of taxes paid on the instrument in question and it is also agreed that the State shall act promptly upon the handling of both collection and the claim for refund after such final decision in the same manner as if both had been included in such mandamus proceedings without the necessity of either party taking any further action respecting such claims or refund.

/s/ Ralph H. Bearden
Attorney for Kendall House

/s/ W. O. Beauchamp, Jr.
Assistant Attorney General
Attorneys for State Department of Revenue

/s/ John Moriarty
General Counsel
Department of Revenue

SUPPLEMENTARY STIPULATION

(Style of Case Omitted)

IT IS HEREBY further stipulated and agreed by and between counsel for the respective parties herein as follows:

The mortgage on the real property in question was not assumed by the purchaser and the purchaser acquired title to the realty subject to that mortgage but without any obligation to pay said mortgage, as evidenced by the contract between the plaintiff seller and said purchaser (see attached copy of that contract marked Exhibit "F").

The question of assumption of the mortgage was negotiated strenuously between the plaintiff seller and the purchaser, the purchaser refused to assume the same, and seller agreed to pay all recording fees and stamp taxes incident to the sale.

By the terms of the sale, and the provisions of the deed, buyer can abandon the property without liability for the mortgage and the note secured thereby. In such event the seller alone is responsible to the holde of the note and mortgage, who can foreclose his mortgage and sue seller only for any deficiency or elect to hold seller only liable on the note without foreclosure of the mortgage.

The mortgagee, Life Insurance Company of Virginia, agreed and consented to the sale of said realty by the plaintiff seller

to the purchaser without the purchaser assuming the mortgage, and said mortgagee continued to hold plaintiff as the original mortgagor, liable on the indebtedness secured by said mortgage (see letter of Life Insurance Company of Virginia attached as Exhibit "G").

When the said mortgage held by Life Insurance Company of Virginia was first taken and recorded, tax levied under Section 201.02 was paid on the note evidencing the debt secured thereby, and documentary stamps evidencing the payment of the same were affixed to said mortgage note at the time of recording. (see Exhibit "H" attached).

Plaintiff paid the instant tax only at the insistance of the buyers through their attorney (see Exhibit "I" attached) and in compliance with plaintiff's contract to pay and all recording fees and stamp taxes. Even then, plaintiff paid the same under protest, and requested a refund thereof which was denied by defendants as set out in more detail in the first Stipulation made herein.

Although the parties stipulate that the States' Claim was based on the fact that the mortgage of $493,705.68 was outstanding and that it is the States' contention that said mortgage was either expressly or impliedly assumed by the buyers and therefore in and of itself constituted consideration, it is

further stipulated that said mortgage was not in fact assumed, but rather that the realty was sold subject to it, and it is therefore contended by plaintiff that the subject-to mortgage did not constitute taxable consideration.

/s/ Ralph H. Bearden, Jr.
Attorney for Kendall House Apartments, Inc.

/s/ W. O. Beauchamp, Jr.
Assistant Attorney General
Attorneys for State Department of Revenue

/s/ John Moriarty
General Counsel
Department of Revenue